

# THE INFLUENCE OF MARBURY v. MADISON'S CASE DECISION ON THE CONSTRUCTION OF JURISDICTION CONSTITUTIONAL<sup>12</sup>

## A INFLUÊNCIA DA DECISÃO NO CASO MARBURY v. MADISON NA CONSTRUÇÃO DA JURISDIÇÃO CONSTITUCIONAL

**ABSTRACT:** analyzes the genesis construction of the Constitutional Jurisdiction through the Marbury v. Madison's case, trial known judged in 1803, which established the foundations of judicial review and enabled the Judiciary's power to review laws or government acts. By legal assumptions outlined in the case trial will be objectified also know the judicial review of law and also the interpretation and application of law by the Judiciary, in order to realize the jurisdiction, honoring the right of justice access and promoting the phenomenon of judicial activism allowing Judges to interpret laws and apply them according to the Human Rights catalog, domestically and internationally by performing the justice.

**KEYWORDS:** Marbury v. Madison, Judicial Review, Judiciary, Constitutional Jurisdiction.

**RESUMO:** analisa a gênese da construção da jurisdição constitucional por intermédio do julgamento do caso conhecido como Marbury v. Madison, julgado em 1803, que permitiu estabelecer os fundamentos da *judicial review*, que possibilitava ao Judiciário o poder de rever as leis ou os atos da administração pública. Pelas premissas jurídicas apontadas no julgamento do caso será objetivado também conhecer o controle de constitucionalidade das leis e ainda a interpretação e aplicação da lei pelo Judiciário, de modo a realizar a jurisdição, prestigiando o direito de acesso a justiça e promovendo o fenômeno do ativismo judicial que permite ao Juiz interpretar as leis e aplicá-las segundo o catálogo de direitos humanos, no âmbito interno e internacional, realizando a justiça.

**PALAVRAS-CHAVE:** Caso Marbury v. Madison, Jurisdição Constitucional, Poder Judiciário, Controle de Constitucionalidade.

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# 1 THE LEGAL ACTIVISM AS AN EXPRESSION OF CONSTITUTIONAL JURISDICTION: AN INTRODUCTION

The legal activism is a phenomenon that has occurred within the Domestic Jurisdiction and also in International Courts and is directly related to the legal system structure that is adopted; the functions assigned to the State and its formal powers and hence the fundamental rights of the individual protection.

Made its mark in the process of reconstruction and denazification in Germany, when defeated in the Second World War, which triggered the start of the structure of the regulatory protection system of the dignity of the human person, in the midst of the German Constitution; beyond judicial laws review mechanisms and the possibility to integrate a "mutual collective security system; with that, she will be accepting limitations on their sovereign rights, in order to create and ensure a lasting peaceful order in Europe and among the nations of the world (GODOY, 2014, p. 02)."

The State functions were diversified and expanded with the development of the rule of law, causing intense judicial activity, aimed at protection of individual rights and the legalization of issues that would otherwise be the function of the Executive or Legislative Branch.

Internationally, the proliferation of international treaties creating International Courts, with complementary characteristics to domestic State judicial systems, caused the access to international justice and the fast development of the Courts Jurisprudence, not always in line with the local Judiciary.

The Judiciary has been provoked to examine and decide socio-political issues impact at the State and worldwide, due to the recognition of the human person as the subject of rights in the Domestic and International Jurisdiction ball that led to the change of Authoritarian States for Democratic with the comprehensive constitutionalization<sup>3</sup>; the

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<sup>3</sup> The comprehensive embracing constitutionalization expression is from BARROSO, Luis Roberto. Legalization, Judicial Activism and Democratic Legitimacy. The comprehensive embracing constitutionalization brought to the Constitution numerous materials that were previously left to the majority political process and ordinary legislation. This was also a global trend, started by the Constitutions of Portugal (1976) and Spain (1978), which was enhanced among us with the Constitution of 1988. The Brazilian Charter is analytical, ambitious, suspicious of the legislature. How intuitive, constitutionalize a matter means turning policy into law. To the extent that a question - is an individual right, a State benefit or a public order - is disciplined in a

fundamental rights movement enshrined in the constitution, the establishment of human rights charters in the midst of the Constitutions and the constitutional jurisdiction by the defense of the Constitution, through mechanisms such as judicial review (BARROSO, 2014, p.04).

The access to justice should be noted, while reassuring right of human dignity caused the legalization issues, that before were the Administrative, Executive and Legislative branches responsibility. Thence the growth of the current tension between the Powers consisting of Democratic States and the discussion on the decisions of International Tribunals or International Organizations, created through multilateral treaties and to be observed in the domestic system.

Thus, the Judicial Activism can also be seen as a result of legalization, which comes, as Stated above, "the constitutional model that was adopted, and not the deliberate exercise of political will, because "[...] a constitutional provision allows a claim to be inferred, subjective or objective, it is up to the judge to know her, deciding the matter [...]" (BARROSO, 2014, p. 04).

In Brazil, the legalization finds its cause in the country's democratization process that culminated in the 1988 Federal Constitution, which established broad list of fundamental rights, making them constitutionals; and the creation of judicial review system, to protect the constitution, ensuring the rule of law, that is, its political unity and the legal basis for the dignity of the human person (HESSE. 2009, p. 03-25).

## **2 CONSTITUTIONAL JURISDICTION**

The formation and preservation of political unity and the legal system are the two essential functions intended for living in society in the sovereign territory of the State and also in extra-territorial relations developed by it (HESSE, 2009, p. 03-25).

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constitutional norm, it becomes, potentially, in a legal claim, which can be formulated in the form of lawsuit. For example, if the Constitution guarantees the right of access to primary education or balanced environment, you can judicialize the requirement of these two rights, leading to the judiciary the debate on concrete actions and public policies adopted in these two areas. Disponível em [http://www.plataformademocratica.org/Publicacoes/12685\\_Cached.pdf](http://www.plataformademocratica.org/Publicacoes/12685_Cached.pdf). Acesso em 11.01.2014

The political unity presupposes the plurality of wills to build a political process that will be the expression of the objectives on which the State will become robust State, to the extent that ensures "uniform will of a sovereign people or a class leader" (HESSE, 2009, p. 03-25).

The State will be successful in its purpose in that it can determine "a binding joint will", and can "set and deliver via the understanding or majority decisions, political objectives" (HESSE, 2009, p. 03-25).

However, it should be noted that these objectives can be carried out only by the State organization, establishing powers and tasks to their organs, through an orderly legal process, which will be accession object throughout the community who live under its aegis to the extent that the fundamental rights of this social grouping are established, determining the scope of the constitutional purpose, which is to promote the State integration through the legal system, which not only organizes the political and administrative structure, but this sort has arguments for the "morally straight and therefore legitimate" (HESSE, 2009, p. 03-25).

The morally right value is the content of so-called canons, which according to Hesse, are "the templates to configure the present and the future of the current generation." For him "the guideline function of the Constitution is to take these canons and - above all in fundamental rights provide them with binding force for the whole legal system" (HESSE, 2009, p. 03-25).

The Constitution to Hesse, is not only the fundamental law of the State, but also to the community under this order seated, and for whom decisions should ensure "the inviolability of the human person as the supreme principle of the constitutional order, the republic, democracy the postulate of the law of social justice, and territorial organization for the Federal State." And "[...] order all walks of life essential to living precisely because said balls are intrinsic to life together and are indissolubly connected with the political order [...]" (HESSE, 2009, p. 03-25).

Therefore, "[...] the Constitution is the basic structural plan, guided by certain principles that give meaning to the legal form of a community." So "whole Constitution is the Constitution in time" (HESSE, 2009, p. 03-25).

The validity and effectiveness of the Constitution, however, depends not only on its political and legal unit, but also its connection to "a reality of a configuration order and

forming a living historical reality [...]" and "[...] behavior of the people involved in the constitutional life, the availability of political leaders and the governed to accept as morally imperative content of the Constitution [...]" (HESSE, 2009, p. 03-25).

In this sense, the Constitution can only achieve its functions and hence maintain its validity and effectiveness when it is submitted "to historical change," and is accepted as the process of change through social facts, without to destroy their identity and keep its continuity, either by making the content of the constitutional requirements, classified as open, is respecting the limits of the reforms of constitutional norms, when necessary, in order to keep intact "[...] the fundamental decisions that shape the identity of the Constitution [...]" because otherwise "the constitutional content is petrified" (HESSE, 2009, p. 03-25).

To ensure the defense of the Constitution, the legislature established instruments by which guarantees the stability of constitutional norms and the preservation of the essential core or the so-called foundation stones from changes that are not necessary.

The first instrument is the constitutional jurisdiction that has as one of its manifestations the judicial review, as is the activity through which an organ, member or not of one of the branches of government, oversees the constitutionality of laws, tutoring application principles and constitutional requirements, to verify the subordination of ordinary laws to the dictates of the highest law, and promoting the implementation and interpretation of the rules already in place or those that require regulation to be met, by case submitted their judgment or not.

The terminology constitutional jurisdiction cannot be confused with judicial review. That's gender while this is kind, since it is only one of several manifestations of constitutional justice.

Cappelletti (1992) asserts that: "[...] the laws of judicial review cannot certainly identify with the jurisdiction or constitutional justice [...]" He continues: "[...] it, on the contrary, is not only one of several possible aspects of the so-called 'constitutional justice', despite one of the most important aspects [...]" (CAPPELLETTI, 1992, p. 23 - 27).

Note that constitutional justice has the primary function to maintain the democratic rule of law, with all its consequences, such as respect for fundamental human rights at any time. To perform this activity, use mechanisms to maintain the supremacy of the Constitution, radiating its normative force and hindering clashes to its principles. A classic example of this

vital function in the Roman-Germanic countries of origin is the host of the laws of judicial review of the institute. Another example is the robust are articles 3, 4 and 20 of the German Constitution, which grants the right to resist, is not no other way, against those who want to destroy the law (DAVID, 1996, p. 283 - 312).

It also cannot fail to mention as the Constitution of the hedging instrument the hierarchy of rules establishing the Constitution as "the norm of norms, the fundamental law of the State" (BOBBIO, 1995, p.162) to which all others are subordinate, so to be a graduated system, admittedly a higher normative value and source of all normative production.

Under the national law, the legislative process and the drafting of the standard system, the primary source of law, are specified in the Constitution, establishing the relevant power, its organs and the hierarchy of norms. The legislative process is characterized as centralized and vertical because it is no body that can develop the standard, which is hierarchical, because one has greater value over others.

Conversely, it is the development of the international standard system, if one can speak in system, because there is not as seen above, a nuclear agency in charge of function of creating the immediate source - the international standard - and establishing the hierarchy of these means production. It is therefore decentralized and horizontally to the extent that States are the subjects responsible for the preparation of the various means of production with international rules (BOBBIO, 1995, p.162).

The legal system can be joint, because "there are several sources placed in the same plane, which means, without metaphor, several standards that have the same value; and a hierarchical or tiered, in which the system there are several sources not placed on the same plane, but placed in different planes, i.e. not have the same value, but a value greater or less, as are hierarchically subordinate to each other" (BOBBIO, 1995, p.162).

Also differentiates the systems in simple and complex, according to possess single source or multiple sources always hierarchical, admitting that, historically, research into the legal systems in always lead to a complex system.

The combination of materials super legality which translates for supremacy of the Constitution on all standards and the subordination of all acts of the State and all of its powers to the rules and constitutional principles - and formal super legality - featuring Constitution as the primary source of legal production - gives rise to the rigidity of constitutional laws and the

origin of the principle of constitutionality of normative acts, valid and effective only when the drafting process is expected constitutionally - its production formally then - and is in line with the principles of the constitutional requirements. Another important Constitution of the guarantee instrument is the judicial review of laws and normative acts.

When considering the need to protect the Constitution, there is the controversy about which body should play such a role and how it would be done. Kelsen (1998) argues that the institution of constitutional jurisdiction is necessary and effective means to ensure compliance with the constitutional requirements for control through the State acts by diverse body of that which drew up the rules so that there will be a positive and a negative legislator. The first prepares the law, and the second declares unconstitutional, in order to generate a gap between the two lawmakers.

Antagonism referred by Kelsen (1998, p.380 - 387) fails to set offense to the Constitution, because, through the judicial review of the constitutionality of laws, it is clear that the powers that be of the State, although independent and harmonious with each other, be open to review on the other, establishing what Canotilho called constitutional ordering inter organics and intra organics functions and controls of State organ. (KELSEN, 1998, p.380 - 387). This applies to the jurisdiction of the Senate, in Brazilian law establishing, privately adjudicate the President of the Republic, Ministers of State and the commanders of the Navy, Army and Air Force for responsibility crimes, pursuant to article 52, paragraph I, of the Constitution. However, Kelsen (1998) warns: "[...] the possibility of a law issued by a legislative organ is revoked by another body is a worthy restriction can note this first organ." He continues: "[...] this possibility means that there is, besides the positive legislature, a negative legislature, a body that can be composed according to a totally different principle from that of the parliament elected by the people [...]" (KELSEN, 1998, p.380 - 387).

So to Kelsen (1998) "[...] an antagonism between the two legislators, the positive and the negative, it is almost inevitable. This antagonism can be reduced by establishing that the members of the Constitutional Court shall be elected by parliament [...]" (KELSEN, 1998, p.380 - 387).

Carl Schmitt, contradicting Kelsen, supports the idea that the Constitution, by its political content, not to be confused with constitutional laws, it expresses values insertion being made by political decision, why not admit the offense to the Constitution is repaired by A Constitutional Court with powers to do so, a member of the Judiciary. The political body

takes precedence over the legal, so that conflicts between powers and between laws would only be reviewed by the political body failing to generate the "politicization of justice" (BONAVIDES, 2001, p.86 - 90).

The controversy between Kelsen and Schmitt served to that, in 1920, created in the Constitution of Austria, the European model of judicial review of laws, not driven by the adoption in Europe, the US system of control, the judicial review of Legislation.

Currently, the laws of judicial review is expressed by two classical systems: diffuse or American model, which allows the judge to supervise the constitutionality of laws, to apply them to a case before it, and the concentrate or Austrian model, in which a single body is empowered to judge definitely the constitutionality of laws and may be a common court, ordinary or specially created for this function.

The French model keeps its origins in the revolutionary movement and the rigid separation of powers. Provides a preventive judicial review because, for any standard join the legal system undergoes a priori review the constitutionality of the text, performed by a political body. There is no judicial review.

The fusion of traditional systems mentioned (American and Austrian) gave rise to hybrid systems, so named because they legitimize the complaint of unconstitutionality of laws and normative acts of organs of the Legislative, Executive and Judiciary.

It remains to mention that the constitutionality of laws control determines some assumptions. They are: 1- the supremacy of the Constitution on the other, because the current system is hierarchical, making it the reference point, and is the primary source of normative production; 2- the implementation of the principles and constitutional provisions when the judges or courts apply standard contrary to the Constitution, or when they apply the provisions which enshrine rights, freedoms and guarantees; 3- the connection between Constitution and constitutional jurisdiction, which, according to the doctrine of Canotilho, is "the character of a legal and binding rule immediately assigned to the Constitution and the need to consider the security and immediate safety of the Basic Law as one of the tasks core of the constitutional democratic State place, of course, the problem the main control of the conformity of the acts of public authorities with the Constitution as one of the key issues of modern constitutionality" (CANOTILHO, 1998, p.782 - 790); 4- through the constitutional jurisdiction, there are new instruments guarantee the rule of democratic rule, such as judicial



review of citizens against unlawful acts committed by Directors and, in the case of Brazil, the guarantee of access to the courts against any injuries, including arising out of acts of public administration; 5- the possibility of the judges, to examine conflict of laws, control their constitutionality and decide for supremacy of the Constitution; 6- constitutional justice also cover the so-called State of justice, whenever there is conflict between the powers. Are the so-called constitutional disputes; 7- knowledge and judgment of acts that violate the Constitution are assigned to a court; 8- control of the regularity of formation of constitutional organs come from suffrage or other political rights; 9. the protection of fundamental rights also is embodied in the constitutional justice, through fundamental rights remedies, (VIEIRA DE ANDRADE, 1998, p. 20 - 28) as the protection of the resource, the Caribbean, the writ of mandamus and injunction, the Brazilians, and the *Verfassungsbeschwerde* (Constitutional complaint), the Germans; 10- direct and significant influence of the Austrian Constitutional Law, which created a court with specific function to control abstractly and in concentrated form the constitutionality of laws, regardless of cases referred to the courts.

The judicial review is contained in the Institute of constitutional jurisdiction as one of its most important functions, because it aims to ensure the constitutionality. It is therefore the supervisory instrument of the constitutionality of laws and normative acts taking place with the submission of standards, considered incompatible with the constitutional, the body controller, political or judicial, so that after its assessment under the formal aspects (external form) and materials (intrinsic, content), decide about their compatibility, deleting it, if inconsistent, the legal system.

The activity carried out by the competent body to examine the constitutionality of the law or normative act entails the constitutionality or unconstitutionality Statement, according to the norm, under consideration, derived from action or omission by the agent or the public agency compatible or incompatible with the principles constitutional. Do not confuse the judicial review with the legality, because in the first case, the constitutional rule is that discipline the act under examination, while the second is the law.

In this sense, Oswaldo Luiz Palu, "everything depends on the standard that governs the act in question. If that's the Constitution, the act is unconstitutional: otherwise, if the requirement is in the law, their lack makes the illegal act" (PALU, 2001, p. 74 - 80). The unconstitutionality may be a positive action, when the normative act offends the constitutional rules, or negative, when there is failure in the duty to legislate, not abstract, but connected

with a constitutional requirement of action. Hence it is a significant and material omission. It can still be total or partial, according to reach all the normative act or part thereof.

The so-called supervening unconstitutionality occurs when an infra law already in place, just before the enactment of constitutional rule, derived from the original constituent power, revision or amendment is inconsistent with it, is not adopted by Brazil, as the Supreme Court considered the repealed. Against the unconstitutionality originating due to the promulgation of the Constitution before the law or the normative act that is contrary to it.

When the opposition occurs between two or more constitutional rules, the earlier rules are considered repealed, in the case of the new constitution or just constitutional requirements. The foundation is the principle that the subsequent law repeals the previous when it is incompatible with. The above current standards and not against the constitution are assimilated by the new constitutional order. As an example, we can mention the receipt by the Brazilian Constitution of the police investigation, which is treated in the Criminal Procedure Code, published in the 1940s, and in the sense contrary, the withdrawal of permission to the police to issue warrant for search and seizure.

The normative consequences of the declaration of unconstitutionality of the law or act may give rise to non-existence, nullity, annulment or irregularity, as is ineffective since its issue and does not require declaration of unconstitutionality, or else shall not take effect since its editing and require declaration of unconstitutionality, or ceases to have effect only when declared unconstitutional, or, finally, be sure to produce data effects to mere irregularity.

With the enactment of Law No 9868/1999, article 27, the position of the Supreme Court was modified to fail to consider the declaration of unconstitutionality as generating factor of the act is void, to consider it voidable, because the Supreme Court, by a majority of two thirds of its members, in view of legal certainty or exceptional social interest can decide when the Statement comes into effect, or restrict them.

### **3 THE MARBURY VERSUS MADISON'S CASE AND THE JUDICIAL REVIEW**

The first expression of judicial review of constitutionality of laws arises with the American Constitution of 1787 and the challenging decision of Judge Marshall in Marbury vs. Madison case, in 1803, obviously without the currently existing contours, but in a very rich period in the history of jurisprudence the US Supreme Court in contributions to the consolidation of the principle of the supremacy of the judiciary under the control of the constitutionality of laws.

The case mentioned refers to the appointment of Madison for the office of justice of the peace in 1801 for the District of Columbia. His tenure was denied by Madison, government secretary, following instructions from President Jefferson. There was a petition of mandamus against Madison. Judge Marshall, in political decision, worried about obedience to constitutional principles, stating that Madison act was illegal and, as such, could not be co-validated front of the supreme law (GEORGE, 2000, p. 17 - 49).

The American contribution to the Constitutional Control Institute of Law is significant because there is no news that in Europe or elsewhere in the world, there was an institute at least similar. Can not be overlooked, too, the fact that the American Constitution of 1787, began the period of constitutionalism and the philosophy that the Constitutions can not be changed by ordinary laws.

The Athenian law already differentiated *nomos*, law in the strict sense of *pséfima*, who owned the decree of sense. The *nomos* could be changed only in extreme cases and that really demonstrated to be necessary. The popular assembly (*Ecclesia*) could propose making laws, but common, which had the characteristics of *psefismata*, should never be contradictory or defy the principles of *Nomoi*. The decrees, when unsuitable or illegal, subjected its creator liability, which was calculated through the illegality of public action (*Grafe paranómon*), and the normative act would be subject to the invalidity therefore in a conflict established between a character law constitutional (*nomos*) and an ordinary law (*pséfima*), should prevail first.

Among the medievos, one can not fail to mention the right and preponderant influence of natural law doctrine of control laws, spreading the idea that natural law was

above standard and primary source of all others and that required the judge his obedience and even its "disapplication" when it conflicted with or descumpria a precept of natural law. Not required, therefore the judge. According Cappelletti, "the medieval conception was then in its formulation, more widespread on the distinction between two standards of orders: the jus naturale, top and non-derogable norm, and the jus positum obliged to not be in contrast to the first" (CAPPELLETTI, 1992, p. 23 - 27).

Also worth noting that it was only possible to control the power of the legislature through a positivado system. The principles of natural law universalized form with the works of St. Augustine and St. Thomas Aquinas and reflected the ideals of the French Revolution, influencing works, such as Montesquieu, without forgetting that the American Independence (1776) came first, and then settled in the constitution of 1787, the principles of natural law doctrine established in the Constitutional State, who came to make positive the innate rights of man, as civil and political, while predicting the limits of the powers, including the legislative and the judicial review.

The American constitutionalism and its control system were not born from night to day. On the contrary, resulted from Edward Coke ideas, which called for the supremacy of law commow on statutory law and the role of judges to complete gaps in the law. Therefore, it would be up to the judges the power to control the excesses on the part of Parliament and the King, establishing the supremacy of law commow. This doctrine, which has been in force many years, came to be changed to be replaced in England, from the Revolution of 1688, the Supremacy of Parliament. The judges have lost the power to control laws. However, American law, the path was reversed because the colonies, from the Declaration of Independence in 1776, became subject to their constitutions, which could not be countered by other laws, keeping the power of judges to "disapply" a law contrary to the fundamental law that constituted the state.

Cappelletti said John Marshall, head of the US Supreme Court, decided by the Supremacy of the Constitution on the other, did not only for "a gesture of improvisation, but rather of a mature act through centuries of history: History does not US only, but universal." This position is contradicted by Rodrigues (1992, p. 42 - 62).

The analysis of the classic models of judicial review of laws and normative acts begins with the differentiation of the legal or judicial control and political. The court is performed by the judiciary organs, because all judges are entitled to argue the

constitutionality of law or normative act when dealing with a matter submitted to them or is granted only to a judicial organ. This control model can be incidental or concentrate, according eventually be done when the judge decides the deal that had been offered or when the power is concentrated in a single body of the judiciary. Hence there are two traditional judicial control models: the American or diffuse and the Austrian or concentrate. Another model that is mentioned in Iacyr doctrine of Aguilar Vieira (1999, p. 39) is the political held by agencies not included in the judiciary structure, as the French.

Diffuse Judicial, concrete or American (except via) finds its roots in the year 1803, when the case *Marbury v. Madison* was submitted to the Supreme Court of the United States, and it was recognized that both federal law and the laws of the States are subject to judicial review, establishing the big difference with English law. The big question debated in this case the probability of the Legislature to amend the Constitution by means of ordinary laws. The decision on the case led to the affirmation of the principle of supremacy of the Constitution by requiring judges of any courts jurisdiction to avoid applying laws that went against the constitutional standards or principles and a special procedure for the amendment of the Constitution.

The above case is a milestone to respect the supremacy which he attributed to the Constitution, since the jurisprudence of the Supreme Court US "[...] competes, not as a mere performer, but as an effective creator of the right [...]" (USERA, 1992, p. 82 – 90).

Currently, through judicial review, any judge of any instance, state or federal, may declare the unconstitutionality of a law, provided that it is on the duty to judge a case where there is conflict between the ordinary and the constitutional norm, should implement the latter. For this institute, not imposed only on state powers submission and obedience to constitutional principles, but also imposes consistency in the interpretation of constitutional provisions, implying uniform interpretation of the law, because it adopted the principle of *stare decisis*, which entails the repeal of the law definitively, with *erga omnes* and retroactively, albeit no longer applied by the courts in a case without give rise to a disapplication in other cases, but is treated as law in disuse or a dead letter. (USERA, 1992, p. 82 – 90).

The concentrate judicial review, abstract or Austrian (course of action), unlike the diffuse or American, concentrates the constitutionality of control in a single body of the Judiciary, with no possibility for the court of any instance, federal or state, out from a law or

normative act, when deciding a case before it, on the grounds of being unconstitutional. It is called concentrated judicial review, abstract, and course of action, because it is made by a specific body of the Judiciary, who are vested with exclusive jurisdiction over all cases of unconstitutionality of laws, in the abstract, because there is no legal claim to be decided between the parties, only one control on the law - form of birth and content (USERA, 1992, p. 82 – 90).

Note that is called the Austrian system, because it was created by Kelsen and prevailed in the Constitution of 1920, through exclusive transfer of the Federal Government, which should promote the process course of action. The dichotomy between the two systems, as has been espoused, also meant the gap between the thought of Kelsen and Carl Schmitt, because while the first understood that the constitutionality of the rules should be controlled by a single judicial body, the second understood control by an impartial body, as President of the Reich.

Despite the contribution of both Hans Kelsen was responsible for preparing the constitutionality control project that was part of the Austrian constitution of 1 October 1920, asserting that the act of developing a standard or its contents could be in disagreement as constitutional provisions, and would require a special Court belonging to a power of diverse State other than that issuing the standard set aside so that its effects could reach everyone, which would not occur if any judge decided to disapply the law ruled unconstitutional in a particular case . Only the parties would be affected by the decision, but the law would continue to apply and would apply in all other cases, including those where the judge constitutional understand. Moreover, the annulment statement of the law, removing its validity, has legal constitutive sentence and not merely declaratory, when its effects are ex tunc, retroactive to the beginning of its preparation or implementation. (KELSEN, 1999, p. 380 - 387).

When conceived in 1920, the control model allowed only to the federal government the power to promote the process course of action, and only in 1929, with the reform of the Constitutional Charter, there was the possibility, via exception of the judiciary ordinary cause the unconstitutionality suit, creating a mixed system. This system was in force at the Constitutional seven December 1929, however, in the period this year and 1945, was not adopted, only gained strength again in 1945, after World War II, because of the harm to the constitutional principles such as human rights abuses.

Paulo Bonavides (2001, p.86 - 90) presents system failures concerning the restriction on the content side of the constitutional order and individual rights and guarantees, is it gives legitimacy to the citizen, reached or not with the law unconstitutional, to promote its annulment in order to ensure their rights, allowing the legitimacy is restricted to bodies or authorities, performing a purely formal control of the standard.

The defense of the Constitution made by the constitutional court says the thought that "[...] constitutional rule shows the relationship between ideology or ideologies identifiable in the community [...]" (USERA, 1992, p. 82 – 90).

Therefore, the constitutional jurisdiction, so it is a branch of traditional jurisdiction, similar to civil, criminal and administrative jurisdiction. What sets it apart, however, is its purpose of stabilizing the fundamental rules of political life and defend them against arbitrariness that can be installed in power.

To achieve these goals it is necessary to interpret the constitutional rule as with the other standards, because only one must speak in standard and validated with effect when it is interpreted and applied.

Hence, one can not forget that constitutional interpretation is not new topic. When setback is old theme that binds the Science of law and state, but also "is the protagonist of the most profound legal reflection that affects not only small routine issues and requiring operator intervention other than legal or political bodies but also the very concept of political and democratic life. It is therefore a key issue in Western Democracies and is subject to tests the ability to interpret social reality and legal and policy of Law and Politics, Philosophy and Sociology and still methodology and Axiology" (PINA, 1987, p. 29).

The constitutional interpretation continues to be the subject of several discussions, given the diversity of precepts of many types that have been introduced in the texts of the Constitutions, as the precepts standards and policies and even structural standards and materials (USERA, 1988, p.101 - 106).

Other criteria to be assessed is the perception of operability or normativity of programmatic constitutional provisions that are present, according Usera, in all modern constitutions, as well as consideration of a "norme chiave" equivalent to the principle of immediate binding on the legislature constrained to develop policies reflected in these

programmatic precepts. These standards, given its "fat" (USERA, 1988, p.101 - 106) may hinder a correct interpretation.

Therefore, the Constitution will always be interpreted to be applied, which is why Usera disagrees with the authors who state that there should be only interpretation of the constitutional text does not get a conclusive answer .. should always be interpreted to "serve as guides interpretation of other constitutional requirements and other interpretive objects" (USERA, 1988, p.101 - 106).

For the author cited the interpretation aims the performance of the Constitution, through its implementation, because in every real case can "produce a synthesis between the text and the reality that purports to regulate" (USERA, 1988, p.101 - 106).

The analysis of the case and the production of a rule of law in the countries of Anglo-Saxon origin is overvalued, determining the premise that in each case resulting in the production of a rule of law to subsume the legal system, and therefore the sentence is erected in indubitada source of law. (USERA, 1988, p.101 - 106).

The constitutional rules are made explicit through the interpretation that is done operatively by the interpreter, meaning to say that the statement will always be linked to certain purposes that materialize in each case and subsequently are "*adjudicados a Justiça Constitucional na qualidade de válvula de adaptación del derecho a su tiempo*" (USERA, 1988, p.101 - 106).

In addition to the above purpose, constitutional interpretation, also aims at integrating the constitutional order, which highlights the institutional nature of interpretation; the formal and substantial control of acts emanating from the relevant subjects in the state bodies, which emphasizes the political nature of interpretation; the election of a constitutionally correct solution, and finally, the defense of a political formula (USERA, 1988, p.101 - 106).

The integration of the constitutional order is done in two ways: the first when the new law rule is added to the precept and interpreted the specific case for which it is applied and, second, when that rule continues to have effectiveness later to contain a predicting how the constitutional court judge in similar cases in the future (USERA, 1988, p.101 - 106).



Hesse says that the will of the Constitution should be combined with the will to power, so you can convert the Constitution in active force. Such wills, but must be in the "consciousness generally particularly in awareness of the main responsible for the constitutional order (1991).

He also points out that three strands reaffirm what he calls the will of the Constitution, "the understanding of the need and value of an unbreakable normative order, to protect the state against the will rambling and shapeless." "[...] The understanding that the established order is more than an order legitimized by the facts (and therefore needs to be in constant process of legitimation);" and still "in the consciousness of that, contrary to what happens with a law of thought, this order fails to be effective without the help of human will. "This order acquires and maintains its effectiveness through acts of will" (HESSE, 2009, p. 19 - 25).

The Constitution guarantees their normative force when the interpretation of its rules takes place according to the present, incorporating the social, political, dominant economic elements, but also, and especially, what Hesse (2009, p. 19 - 25) calls "spiritual state of its time." "This gives you the guarantee as an appropriate and just order, the support and defense of the general consciousness) must also be observed the ability to update the content of fundamental principles to be established, prioritizing quality and disregarding" the constitutionalization of momentary or private interests" that will require "constant constitutional review, with the inevitable devaluation of the normative force of the Constitution, adding plural structures." (HESSE, 2009, p. 19 - 25).

The interpretation "[...] has decisive significance for the consolidation and preservation of the normative force of the Constitution. The constitutional interpretation is subject to the principle of optimal implementation of the standard" (HESSE, 2009, p. 19 - 25).

Hesse (2009, p. 19 - 25) goes on to state that this principle "can not be applied based on the facilities provided by the logic subsumption and the conceptual construction. The right and, above all, the Constitution, have their effect conditioned by the hard facts of life, it is not possible that the interpretation make them clean slate. He will contemplate these conditions, correlating them with the normative propositions of the Constitution. The appropriate interpretation is one that attains, excellently sense of normative proposition within the ruling actual conditions in a given situation.

The formal and substantial control of the acts emanating from the relevant subjects in the state bodies, which emphasizes the political nature of constitutional interpretation, it is not meddling in other powers, but is a control of the subjects that can perform actions discretion incompatible with constitutional requirements, and acts with defects.

The election of a constitutionally correct solution, and finally, the defense of a political formula are still specific purposes of constitutional interpretation. Among the various hypotheses solution the interpreter must have recourse to procedures that enable the disposal of solutions that seem wrong, aiming to maintain the political formula that is the essential core of the Constitution, which will determine the election of one or more normative assumptions (USERA, 1988, p.101 - 106).

The political formula is "a pre-constitutional as it is completed and settles in the Fundamental Charter, adopted as herself." Is the constitution in the material sense, functioning as firstborn source of state law. Hence his "final configuration not be finalized until it comes to fitting in a legal organization" (USERA, 1988, p.101 - 106).

Therefore, "the Constitution material remains in a separate plan of formal. The political principles and the social model continue to evolve the written text of the margin, decisively influencing the interpretation of it" (USERA, 1988, p.101 - 106).

And yet, the political formula embodies the ideology of interpretation, because all constitutional rule shows the relationship that links to an ideology or identifiable ideologies of a collectivity. (HESSE, 2009, p. 19 - 25). The political orientation of a people in modern societies arises from the confluence of different ideologies, all legitimate for the construction of this guidance. "

In contemporary Western societies, we can identify three basic ideological pillars of any democratic system: the idea of power limitation; the guarantee of fundamental rights and freedoms and the idea of supremacy of the constitution (USERA, 1992, p. 82 – 90).

Thus, "the ideological character of interpretation is therefore closely related to the socio-political reality of the time that applies to standard and the reality that seeks to stabilize in its essential elements through a Constitutional Code and its corresponding formula" (USERA, 1992, p. 82 – 90). And despite variations constantly suffered by the ideological context to which the interpretation, never can the limits drawn by the principles reflected by the political formula, are exceeded. It is not just the choice of method to be used in the

interpretation, but and mainly, the ideology that forms the core of the political, legal and social order of a nation. So there is no neutral technique or method, but guided by a political method.

Next to the constitutional jurisdiction created to protect the Constitution and then access to justice, promoting the legalization of fundamental rights, judicial activism arises as performing instrument of political formula adopted by the state, according to the omissions of legislative and executive branches in implement public policies<sup>4</sup>; conducting fundamental rights, enabling the domestic jurisdiction and also the international jurisdiction on consideration of human rights and humanitarian violations<sup>5</sup> through action or omission.

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<sup>4</sup> The concept of public policy is Enrique Saravia, when he says that "This is an issue of public decisions, oriented to maintain the social balance or introduce imbalances intended to alter that reality. Decisions conditioned by the flow itself and the reactions and changes they cause in the social fabric as well as the values, ideas and visions of adopting or influence the decision. You can consider them as strategies that link to various purposes, they all, in some way desired by various groups participating in the decision-making process. The ultimate purpose of such dynamic consolidation of democracy, social justice, power, maintenance, happiness of the people - is overall guiding element of the numerous actions that make particular policy. With an operational perspective, we could say that it is a system of public decisions aimed at actions or omissions, preventive or corrective, to maintain or modify the reality of one or more sectors of social life, through the definition of objectives and action strategies and the allocation of the necessary resources to achieve the established objectives. Importantly, the public policy process does not have a clear rationale". Políticas públicas; coletânea / Organizadores: Enrique Saravia e Elisabete Ferrarezi. – Brasília: ENAP, 2006. SARAVIDA, Enrique. Introdução à teoria da política pública. 1 v.

<sup>5</sup> Human Rights and Humanitarian understood all the fundamental rights of the human person willing in the Federal Constitution and all other arising from international regulatory systems that Brazil is a member and also the arising of customary international law and jus cogens. The use of terminology Human Rights has been trivialized by various segments of society, giving elasticity to the term that does not cooperate for their intelligence. Before coming to promote their impropriety as to the meaning Hence, as a rule, is used to designate the rights set positivized by the state but that are not being exercised by persons or groups of people who feel marginalized. It must be noted also that the term human rights is, often laden with ideology and is used as a synonym for property, access justice, economic, social, civil, that do not have the same meaning for all contributing States to generate ambiguity in the term object of this analysis. In this regard, one can not fail to mention the work of Jeremiah Bentham, where three relevant aspects are addressed with the term Human Rights. They are: 1) The probability of incurring error is provided by the confused idea that has on certain terms and their various meanings. "*Palabras tales como leyes, derechos, seguridad, libertad, propiedad y poder soberano sono términos que se emplean con gran frecuencia en la creencia de que hay acuerdo sobre su significado, sin reparar en que tales expresiones tienen gran número de acepciones distintas [...]*" 2) The contradiction between the descriptive and prescriptive levels is one of the factors that hinders the understanding of the term, because while the first describes the rights and freedoms such as government bonds to the individual; the second is located in the field should be. Hence Pérez Luno stating that "[...] *la falácia más común en el lenguaje de los derechos humanos consiste en la confusión entre los niveles descriptivo y prescriptivo. El artículo primero de la Declaración Francesa de 1789, al proclamar en "Les hommes naissent et demeurent libres et égaux en droits", incurria en este vicio.* He continues: [...] It is clear, for Bentham, *La contradicción que existe entre la realidad práctica y esas supuestas facultades de libertad e igualdad que aparecen formuladas en términos descriptivos, como un hecho, cuando no constituyen más que objetivos situados en el plano del "deber ser."* 3) The right term, a noun has two meanings: a legal and other anti-legal. For Bentham "*El decerto Ne sentido legal o rela es hino de La lei, porque La leões realces an origens a derechos legales; en tanto que el derecho en sentido anti-legal es una pretendida ley de la naturaleza, una metáfora empleada por los poetas, retóricos y charlatanes de la legislación.*" "*[...] El derecho, en sentido metafórico e ilegal en forma de derechos naturales, es una espécie de talismán que obra en manos de quienes lo manejan como un instrumento para rechazar todo lo que lês molesta y subyugar a quienes se oponen a sus opiniones através de esta falácia verbal convertida em articulo*

## 4 THE DEFINITION OF LEGAL ACTIVISM IN INTERNATIONAL LAW

The judicial activism within the domestic or international jurisdiction is directly linked to law enforcement in the case, and then the interpretation of the law so that it ceases to

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*de fé*". The criticisms raised by Jeremiah Bentham about the meaning of human rights expression are valid because other names are used without having knowledge of their true scope. Remember that the human rights name is commonly associated with natural rights, fundamental rights, legal rights, individual rights, freedoms and guarantees, and even directly related to the principle of human dignity. Natural rights are those that transcend history and its politicization performed by man. The rights of all people in all times and places, there are absolute, inalienable, unchanging and timeless. Stem from the nature of man and are not subject to restriction by law. Natural rights would always be one of the components of human rights alongside other as political, civil, economic, social, etc. In this sense, Thomas Paine says "los derechos humanos constituyen la conjunción de los derechos naturales," aquellos que lê corresponden al hombre por el mero hecho de existir", y los derechos civiles, "aquellos que lê correspondan al hombre por el hecho de ser miembro de la sociedad". Human rights containing natural rights would be prior to the formation of the state, coming from ethical and moral precepts of man to justify the respect of all men. Found in the preamble of the Universal Declaration of Human Rights the characteristic of the human right as natural right "Whereas recognition of the inherent dignity of all to all members of the human family and of the equal and inalienable rights is the foundation of freedom, justice and peace in the world. "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which men enjoy freedom of speech, belief and freedom to live safe from fear and want has been proclaimed as the highest aspiration of the common man. "Still contain human rights so-called fundamental rights that are anointed in the Constitutions, featuring political ideology and legal structure of the state. Fundamental rights, as a rule, are dictated on a domestic level, as enshrined in the constitutions and regulated by ordinary laws, in line with the Declaration and international treaties which consolidate the delimitation and the scope of its meaning. The United Nations Charter in its preamble mentions the words fundamental human rights, but in his first title in dealing with objectives and principles mentioned in Article 3: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." Also worth highlighting that the Universal Declaration of Human Rights, in its preamble, states: "The member states undertake to promote in cooperation with the United Nations, universal respect for and observance of human rights and fundamental freedoms", and still "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge." Both documents mention the rights and freedoms did portraying the ambiguity of the term human rights, which, here, can not be understood otherwise than as a combination of natural and fundamental human rights, but also their self-determination powers which are allowed, because recognized by the state. Alongside rights and freedoms is spoken even in guarantees, which would be the means made available by the realization for those. Would be "remedies", actions, instruments or mechanisms that effective rights and fundamental freedoms. The Brazilian Constitution also confirms in their devices this separation of rights, freedoms and guarantees. However in some devices the constitutional legislator misused as a synonym rights guarantees, freedoms and rights or guarantees. A classic example is found in the letter, in XXXIV of article 5, which ensures the "right to petition the government for defense of rights or against illegal acts or abuse of power". When the correct denomination is freedom. Canotilho, to discuss the matter, portrays differences and similarities of categories rights, freedoms and guarantees, as follows: Fundamental rights appear alongside freedoms and guarantees, and the differentiation between them of fundamental importance, because it will determine how are systematized in the Federal Constitution, if a single title or in addition, in many of the Largest Law devices. According Canotilho, that geographical provision in the Constitution will establish a special constitutional legal regime, with binding force and direct application, which will be parameter for what he calls the rights, freedoms and guarantees of a similar nature to the rights, freedoms and guarantees that will be treated equally to the rights formally established in the catalog of rights and freedoms, regardless of topographic position they hold. This treatment regards common principles that would apply. They are: direct application, linking public and private agencies, equality, universality, access to law, court, free or consensual protection, in addition to civil liability of legal persons, and still subject to limits set by morality, public order and welfare in a democratic society.

be an abstract normative precept and materialize when the judge conducts the jurisdiction, ie apply the law to the case.

But first define what comes to international legal activism and its genesis, it should be noted that this phenomenon was due to two major factors: the first attached the consolidation of the rule of law, its genesis and regulatory framework and the second to lengthy legislative and executive branches to regulate the constitutional provisions on rights and freedoms of the individual and implement policies for the promotion and protection of such rights.

The relevant factor for the onset of activism was the understanding that the rule of law legal structure is critical to the interpretation of laws and their application in order to make the living law. Live right meaning in the view of Eugen Ehrlich (2001) of the three conceptions of law: the formalist, expressed by the "reality created by human ingenuity, but a valid reality itself", the idealist, "reflection of another more perfect order , which should serve as a point of reference or on the legal science or the law "and the sociological dealing with the" social reality, inextricably linked to concrete society in which it operates and which is dependent. " The author points out as the object of their study, the ideas developed by Ehrlich (2001) from the influence that suffered the Historical School of Law, whose representatives Friedrich Carl von Savigny and Puchta understood as well as other sociological schools, the legal phenomenon as a kind of social fact, only recognizing the historical aspect of each law (MALISKA, 2001, p. 38 - 40).

Ehrlich has distanced itself, however, the ideas of Savigny and Puchta, and soon, the Conservative Historicism of those, with the development of their studies with the movement of the Free Law School, stating that the legal phenomenon is also social.

From that thought, there is a need to understand the law in its sociological requirements, with the applicator of the standard being required to seek the reality of social facts for the realization of justice and should even move away from the norm when it is unfair.

The legal phenomenon as compared Kelsen and Ehrlich comprises for the first two areas: the be-duty - which understands the law as the standard, having deductive and normative - and the being in whom the law is a phenomenon which is understood by means of inductive procedures. This analysis seems important to understand the legal phenomenon in

that, through the legal rules, "new law facts may thus arise not only through force, as is so often thought in the past, or through action silent imperceptible social forces, that is, through new types of association [...] " (EHRlich, 1986, p. 299 - 305), which trigger the obedience to the rules, only when going to order social relations.

The Historicism, next to the nationalism and transcendental idealism (KANT, 1987, p.65), emerged from the German Romanticism. That thought had double feature, namely: a) was conservative, rejecting any coding; b) relativist, assuming the use of customs and rules, finally the right day by day. Overcoming the conservative movement originated through Dilthey, the Natural Science object distinction (Man is the guy who studies the object on which it is outside) and social (Man is the subject and the object study) (EHRlich, 1986, p. 299 - 305).

The Sociology of Knowledge was created by Karl Mannheim's work, which developed the concept of total ideology, applied social sciences, as "a set of consciousness structure of a social class or category, including your style of thinking, socially conditioned" (EHRlich, 1986, p. 299 - 305).

The State, from the viewpoint of Ehrlich, is "a social association, the forces acting in the state are social forces; all emanating from the State, as the action of the government and, above all, the state legislation, are works of the company, run by the association that it has established for this purpose and the State" (MALISKA, 2001, p. 38 - 40), while Law means "an order of habitual behaviors and not a coercive order. The law existed and exists independent of the state, it does not have the basis of their existence to state coercion. "

The opposition thought Eugen Ehrlich to the Theory of Kelsen, because the law should not be understood with abstract character and deductive, so formal and diverse social reality. Upside down, as a social phenomenon, is concerned with social life, motivated by the influence of "internal orders of social organizations" and not at all by the Legal Requirements, which should not be confused with Legal Standards. The first is "the drafting of a legal determination on a law or a code" (MALISKA, 2001, p. 38 - 40).

While Legal Standard is a "legal determination translated into action, as in a small pool, even without a clear writing. The first effect when turn on Mondays" (EHRlich, 1996, p. 299 - 305).

The study of the Historical School of Law and its overrun by Eugen Ehrlich, with the development of the Living Law School, portrays the differentiation between the Legislated law and the right of everyday life, one that emerges from the internal systems of social groupings of customs, finally, the (un) meetings in interpersonal relations.

There is no contempt to the codified law, but this is interpreted and understood from the perspective of Social Phenomena<sup>6</sup>, as "a free creation of law, it is not as if he believe, a creation of the law free law, but a creation of law that is free of unnecessary and superfluous bundling an abstraction or a structure" (MALISKA, 2001, p. 38 - 40).

The improvement of the judicial structure, through sensitivity (SILVA.1999), that is, the ability to perceive reality and allow not only satisfactory results in the course of adjudication, in order to apply the law, but seeking justice as a reality and not just as ideal, so demystifying access to justice as a guarantee the improvement of the judicial structure, through sensitivity, ie the ability to perceive reality and allow not only satisfactory results in the course of adjudication, in order to apply the law, but seeking justice as a reality and not just as ideal, so demystifying access to justice as few warranty and allowing, in the words of the French sociologist Michel Maffesoli (1999) "listen to the social, diving into the imaginary to penetrate the contradictions, accept the 'contradictorial', the coincidence of opposites, the conflictual harmony [...] "and" give up the desire to be God to better understand human "and identify what cements the social, being" open to sensible reason [... ] There is no humanity without imagination [...] "because" [...] what mobilizes people is passionate, not the rational [...]" (MAFFESOLI, 1999, p. 17-23).

The legal system, the set of standards existing in the country and determining the legislature to decide on the establishment of hierarchical categories of power, can only be structured from the culture of the people of ethical and moral values that have human associations, and of "habits, domination, possession, provision (mainly the contract and the declaration of last will)" which, as they expand, will dictate the rules of behavior that may

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<sup>6</sup> Social phenomenon understood as the facts from human relations in certain associations and through these will become social organizations. For Eugen Ehrlich "an isolated incident emerged in society is not a social fact; an isolated institution may not lead to social norms and remain unobserved by society. Only when it expands and becomes general, becomes constitutive of the social order. Only when a social phenomenon, because of its expansion, becomes permanent phenomenon, society is forced to take a position (whether a new form of family, a new church, a new political orientation, a new relation of submission , a new form of ownership, a new contract content); in this case, the company shall reject and combat this new form or else integrate it into the general social and economic order, to be an appropriate means to meet the social and economic needs; when this occurs, becoming new way of organizing society and, therefore, a social relationship, where appropriate, a legal relationship.

constitute in legal standard or not, in order to enable the analysis the law as a legal phenomenon and must be assessed in its concreteness, under penalty of being despised by society where you want to apply it.

In this sense, it is necessary to establish the system source and then the sources of law in the face of this system. While the law is the main source in the Roman-Germanic origin system; case law and judicial precedents are the elements that make it possible to resolve the question posed in court, in so-called Common Law system.

The big difference between the rule of law consisting of one or another system is the first one mentioned above "originated in the German liberal culture of the second half of the nineteenth century and then spread throughout the continent, influencing in particular the right public of Italy United and Third French Republic. " The second "boasts very deep roots in the political and constitutional history of Great Britain, from the Norman Conquest to the modern era, and printed an indelible mark on the constitutional structures of the United States and many countries that have suffered the influence of British institutions" (ZOLLO, 2006, p.03 - 10).

The diversity of the constitution of one or the other does not change the deep connection established between the rule of law and fundamental rights of the individual that were made throughout the nineteenth and twentieth centuries and deserve political institutions and state regulatory systems and international the guarantee of legal rights.

Note, however, that the legal system originated in the common law, English law, dating from 1066, was made up of local customs and the jurisdiction provided by the local courts (Hundred Courts and Courts Coutry), when there was the Norman invasion and ordered the formation of a common law for all of England, which was made based on the jurisprudence of Westminster courts (DAVID, 1996, p. 283 - 312).

This jurisprudence was reinterpreted in the mid-fifteenth century, in the face of absolutism of the Tudors, with extensive use of equity, which generated a lot of animosity that would last until the Nineteenth Century<sup>7</sup>.

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<sup>7</sup> The Chancellor examines the cases before them according to a method and system entirely different proofs of the common law. Always receives initially a dossier, or written documents which do not have the assistance of a jury. DAVID. René. Great Law Systems Contemporary. Tradução Herminio A. Carvalho. 3rd ed. São Paulo. MARTINS. 1996. P. 310-312.



The modification of the procedural system and judicial organization, influenced by Jeremiah Bentham (DAVID, 1996, p. 283 - 312) of, allowed were removed the distinction between the courts of common law and the Chancellery (equity), and all have become used favoring the development the legislation as an important source of law, but not coded.

This importance the law as a source of English law takes up different shapes, only in the nineteenth century, even stronger, according to the World Wars and also the "state interventionism of the welfare State" (DAVID, 1996, p. 283 - 312), held especially by legislation, which is built in a more agile way than the precedents of the common law, seeking quick legal solutions to the many deducted claims, given that the English lawyers sought precedents in the rules of law applicable to specific cases.

This rule of precedent (rule of precedent) meant that the lawyer should research a case settled a similar case, judged, and apply it to the case to be tried by the technical distinctions, which adds up when the interpreter limits the extent and scope of the legal rule, although detailed and patient populations.

The Constitution to Hesse, is not only the fundamental law of the state, but also to the community under this order seated, and for whom decisions should ensure "the inviolability of the human person as the supreme principle of the constitutional order, the republic, democracy the postulate of the law of social justice, and territorial organization for the Federal State" (HESSE, 2009, p. 19 - 25).

And "[...] order all walks of life essential to living precisely because said balls are intrinsic to life together and are indissolubly connected with the political order. Therefore, "[...] the Constitution is the basic structural plan, guided by certain principles that give meaning to the legal form of a community." So "whole Constitution is the Constitution in time" (HESSE, 2009, p. 19 - 25).

The validity and effectiveness of the Constitution, however, depends not only on its political and legal unit, but also its connection to "a reality of a configurator order and forming a living historical reality [...]" and "[. ..] behavior of the people involved in the constitutional life, the availability of political leaders and the governed to accept as morally imperative content of the Constitution [...]" (HESSE, 2009, p. 19 - 25).

In this sense, the Constitution can only achieve its functions and hence maintain its validity and effectiveness when it is submitted "to historical change," [...]" (HESSE, 2009, p.

19 - 25) and is accepted as the process of transformation means of social facts, without destroying their identity and keep its continuity, either by making the content of the constitutional requirements, classified as open<sup>8</sup> is respecting the limits of the reforms of constitutional norms, when necessary, in order to keep intact "[...] the fundamental decisions that shape the identity of the Constitution [...] because otherwise "the constitutional content is petrified [...]" (HESSE, 2009, p. 19 - 25).

## 5 CONCLUSION

The genesis of diffuse control of constitutionality was with the decision of the US Supreme Court in the case known as *Marbury vs. Madison*, where Judge John Marshall created the judicial review and also the power of the Court to determine the constitutionality of the acts of the other powers, the legislative and executive.

The decision was innovative and directly influencing the various constitutional control systems, leading to the conclusion that the Constitution has primacy over infra laws and that any rule should be interpreted in line with the constitutional principles, in order to protect the human person.

Still there is in our case that the legalization of issues relating to executive and judicial branches were already present and that the United States were precursors building common legal concepts to constitute a legal legacy in defense of the Constitution and consequently the rights and freedoms the human person.

Evidenced in *Marbury vs. Madison* that the constitutional jurisdiction is a defense mechanism of the Constitution and logo rights, freedoms and guarantees, forcing the interpretation of the law to apply it-and so allow access material Justice.

Certainly, there is a common concept of constitutional interpretation, but on this common concept build interpretations depending on the organs that carry and also because of their duties and their goals.

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<sup>8</sup> According to Konrad HESSE on *Fundamental Issues of Constitutional Law* published by Sao Paulo: Saraiva, 2009. p. 14, "[...] open standards are rules that, in general formulation and linguistically schematic only through progressive concretions can be put into practice. Similar concretion is only possible when the text of the standard is referred to the historical reality sector on which the norm wants to project [...]" .

The act of interpreting a rule of law is an act of will, but linked to the interpreter, because one can not disregard the content of the Constitution. To accomplish this task, the interpreter must have extensive list of paraphernalia and canons (topoi) that will guide your work (USERA, 1988, p. 82).

The procedure to be followed by the interpreter and the like is not uniform in all cases because the ritual to be followed will depend on the interpretation of the object. The object will determine the interpretive methods as it is autonomous and that autonomy is erected in transcendental hermeneutic canon because it directs the previous selection method which will be an essential and common operation at any proceeding under law.

The interpretive path and the purpose of interpreting the interpreter indicate the best methods or the method to be adopted to achieve a satisfactory result. The interpretation guided by the elements and applied hermeneutical methods determine the standard that will solve a case, as was the decision of Judge Marshall.

The interpretation must therefore add as many techniques, which should be coordinated and harmonious to avoid fragmentation of hermeneutics activity, and achieving a single standard from these techniques adopted. Thus the transcendental mission of the interpreter is to sort the plurality of interpretative elements that are at your disposal.

The methods may involve failure in interpretation when the interpreter reduces all elements or extralegal criteria to include them as legal, summing up the mere subsumption. It lists as legal elements of interpretation within the constitutional framework the logic element, which contains the literal; the systematic element; historical and teleological.

The literal element is the obligatory reference point. The text is the first vehicle used by the interpreter to solve the problem posed. The legislative formula points to the appropriate standard if not involve other extratextual elements. However, if involve no need to understand the linguistic expressions. The language will serve for the assessment of various diamonds elements such as the predecessor legislative will. It is therefore the language "universal medium in which it happens understanding." If interprets a text by a result that will be another text. It is decided by linguistic signs.

The rules are interpreted according to the context, understood not only as the position of a rule within a legislative framework, but also consistency with content from different provisions, which highlights the systematic element. The entire law must be interpreted

according to the Constitution. This is one of the essential criteria for constitutional interpretations. Usera highlights Savigny as an expression of systematic description of the element "that links the provisions and rules of law in a wide unity" (USERA, 1998, p. 98).

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